UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/776
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 776

Case No. 485: KIOKO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 15 May 1992, John K. Kioko, a former staff member of the United Nations Environment Programme (hereinafter referred to as UNEP), filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1992, 31 March, 30 June and 31 December 1993, the time-limit for the filing of application with the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, suspended the time-limit for the filing of an application with the Tribunal until 31 May 1995;

Whereas, on 31 May 1995, the Applicant again filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 August 1995, the Applicant, after making the necessary corrections, again filed an application in which he requested, in accordance with article 12 of the Statute of the

Tribunal, the revision of Judgement No. 532, rendered by the Tribunal on 24 October 1991;

Whereas the application contained pleas which requested the Tribunal to find:

"...

(a) That the Executive Director's decision to dismiss the Applicant was done without authority;

...

(d) ... that the lack of authority of the Executive Director of UNEP to properly terminate Applicant's permanent appointment was only brought to the Applicant's attention after Judgement No. 532 had been taken and as a contingence;

(e) That the existence of this new evidence warrants revision of Judgement No. 532;

(f) That the Applicant should be compensated for lost wages for the period of time from when he was illegally separated from the Organization on 18 May 1984 and 14 June 1990, when the Executive Director was given the authority to terminate him."

Whereas the Respondent filed his answer on 3 October 1995;

Whereas the Applicant filed written observations on 10 November 1995;

Whereas the facts in this case as set forth in Judgement No. 532 are as follows:

The Applicant appealed the termination of his permanent appointment in UNEP. In its Judgement No. 456, Kioko, rendered on 2 November 1989, the Tribunal ordered the rescission of the decision to terminate the Applicant's service with UNEP. In accordance with article 9.1 of its Statute, the Tribunal ordered the Respondent to pay the Applicant 18 months' net base salary (less 6 months' salary already paid) if the Secretary-General decided to take no further

action in the case (paragraph XVI). The Secretary-General elected to pay the compensation fixed by the Tribunal.

The Applicant appealed to the Tribunal again on 22 October 1990, arguing that the Respondent had not implemented Judgement No. 456 correctly. In its Judgement No. 532, Kioko, rendered on 24 October 1991, the Tribunal held that the Respondent had not implemented Judgement No. 456 in a timely manner and ordered the Respondent to pay the Applicant an additional three months' net base salary for the "relatively short delay" in implementing the Judgement (paragraph IX).

Whereas the Applicant's principal contention is:

The authority to terminate permanent appointments for unsatisfactory service was not delegated to the Executive Director at the time he separated the Applicant from service on 18 May 1984. This fact constitutes new evidence that was brought to the Applicant's attention only after the Tribunal had rendered Judgement No. 532, Kioko (1991). Consequently, revision of Judgement No. 532 is warranted.

Whereas the Respondent's principal contention is:

The Applicant's request does not satisfy the provisions of article 12 of the Tribunal's Statute.

The Tribunal, having deliberated from 31 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant requests revision of Judgement No. 532, under article 12 of the Tribunal's Statute. The Applicant alleges that, after Judgement No. 532 was rendered, he became aware that his separation from service was decided upon by the Executive Director

of UNEP who, at the time, was not competent to take such a decision. The Applicant claims that this constitutes a new fact, unknown to him at the time this Judgement was rendered, and that, therefore, article 12 of the Tribunal's Statute is applicable.

II. The Tribunal notes that the Applicant's dismissal was not the issue on which the Tribunal ruled in Judgement No. 532, which dealt solely with the manner in which Judgement No. 456 had been implemented.

Any new circumstances in connection with his dismissal, that may have become known to the Applicant, in no way affect Judgement No. 532, thus rendering article 12 inapplicable.

III. For the foregoing reason, this application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 777

Cases No. 820: MANSOUR
No. 880: MANSOUR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 25 October 1994, Khalil Mohammed Mansour, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal, inter alia, to order:

"...

1. The rescission of the deferral of annual increment of 10 June 1993 (...) and all the subsequent disciplinary measures/administrative decisions which depended mainly on the foregoing deferral;

2. Reinstatement in my former post of Vehicle Maintenance Officer/SAR [Syrian Arab Republic];

3. The rescission of the contested new post description (...), which is the subject matter of my second appeal/second recommendation of [the] JAB [Joint Appeals Board] and Com[missioner]-Gen[eral] (...), and revers[ion] to the former post description, which is mainly connected with my Letter of Appointment (...);

4. The rescission of the decision of termination of appointment of 6 March 1994 (...), and consider[ation] of the period ever since my termination as a special leave with full pay;

5. [Payment of] 30,000, thirty thousand US dollars in compensation for the moral and financial harm and damage and injustice and prejudice."

On 10 October 1995, the Applicant filed a second application requesting the Tribunal, inter alia, to:

"...

(1) Consider the Joint Appeals Board's findings and recommendations (...) [of 14 July 1995] as ... evidence for my case (...) before the Tribunal as they contradict the assertions of UNRWA's officials;

(2) Give credence to the Board's recommendations mentioned above;

(3) Consider the period from March 6th, 1995 until my return to my ex-job as a working period;

(4) Return to status quo ante separation, so that I return to my ex-job as Vehicle Maintenance Officer, SAR, with a clean slate. Otherwise, UNRWA is to pay me my salary as of March 6th, 1994 until I reach 60 or until the winding up of UNRWA's works, whichever date is earlier, with a fair pension or termination indemnity equal to that of the other staff members with all rights accumulated due to these actions;

(5) UNRWA is to issue a statement of apology ... to regret the injustice I have encountered, to cancel all correspondence issued to maltreat me and to issue a new service certificate in my name based on the new clean slate; and

(6) [Order payment of] US$50,000.00 (fifty thousand US dollars) in compensation for moral and financial harms and damages, injustice and prejudice, including legal consultation fees, typing and copying, and other costs."

Whereas the Respondent filed his answer on 10 October 1995, in respect of case No. 820, and on 30 April 1996, in respect of case No. 880;

Whereas the Applicant filed written observations on 27 April 1996 in respect of case No. 820, and on 1 October 1996, in respect of case No. 880;

Whereas, on 9 November 1996, the Applicant filed an additional document with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, an area staff member, entered the service of UNRWA in the Syrian Arab Republic (SAR) on 3 October 1974, as a Trade Instructor at the Damascus Vocational Training Centre, on a six-month fixed-term appointment, at grade 9. His appointment was converted to a temporary indefinite appointment, with effect from 1 September 1975. On 8 November 1979, the Applicant resigned. On 12 May 1988, he re-entered the service of UNRWA, SAR, as a Vehicle Maintenance Officer (VMO) at grade 12, step I, on a temporary indefinite appointment. With effect from 6 March 1994, the Applicant's appointment was terminated, under staff rule 109.1, and he separated from service.

The Applicant's periodic report dated 4 March 1993, which was completed on 7 June 1993, contained low ratings in seven of ten "Performance and Personality Factors". His overall rating was the second lowest of five ratings, "a staff member who maintains only a minimum standard of efficiency".

In a memorandum dated 4 June 1993, to the Field Supply and Transport Officer, SAR, the Vehicle Workshop Inspector gave an evaluation of the vehicle workshop staff, including the Applicant. Citing several examples of the Applicant's poor performance, he concluded "In my opinion, he is the most incompetent VMO I ever met and his performance, instead of becoming better, was getting far worse than anybody expected."

Following a recommendation by the Applicant's supervisor, on 10 June 1993, the Field Personnel Officer informed the Applicant that, based on his periodic report completed on 7 June 1993, his salary increment would be deferred for three months. In a letter dated 5 July 1993 to the Director of UNRWA Affairs (DUA), the Applicant objected to this decision, noting that he had been given additional work that was not part of his job description. He concluded that the real reason for the deferral was not mentioned in the letter of 10 June 1993.

In a reply dated 14 July 1993, the DUA informed the Applicant that "... the decision to defer your annual increment for three months was correct. It is clear from the file that your performance has deteriorated from its previous acceptable level and it is also clear that this deterioration in your performance has been discussed with you on several occasions and that you, yourself, have acknowledged it". He suggested that the Applicant "devote more energy and attention to the practical requirements of your job to raise your level of performance back to an acceptable level". On 3 August 1993, the Applicant lodged an appeal against this decision (the first appeal) with the Joint Appeals Board (JAB).

On 9 August 1993, the Applicant submitted a "criticism of materials form" criticizing Volkswagen spare parts that did not conform to specifications and that showed both faulty workmanship and faulty material. The Field Supply and Transport Officer (FSTO) signed the criticism of materials form on 19 August 1993. By letters to the FSTO and others, the Applicant documented several other instances in which he believed that spare parts delivered to him were faulty. He alleges that the actions taken against him by UNRWA were in retaliation for his reports concerning the inferior quality of spare parts and tyres being used by the Agency.

On 12 August 1993, the Applicant's post description was altered, as a result of a reorganization of the Supply and Transport Department. In a letter dated 19 August 1993 to the DUA, the

Applicant stated that "there are many additional works added to my job" and that these new responsibilities "do not match my grade, which should be increased at least 2 grades". In a reply dated 30 August 1993, the Field Administration Officer, SAR, informed the Applicant that the Management Services Division had "evaluated the post description and checked it for responsibilities and assigned it the grade of 12." On 12 September 1993, the Applicant lodged an appeal against this decision (the second appeal) with the JAB.

In the Applicant's periodic report dated 6 September 1993, his supervisor gave him low ratings in five out of ten categories, with an overall rating as "a staff member who maintains only a minimum standard of efficiency". He recommended that the Applicant's annual increment be deferred until the end of the reporting year. In a letter to the DUA dated 16 November, the Applicant noted that he had not seen the foregoing periodic report and that it had not been discussed with him.

The Applicant's periodic report dated 30 January 1994 gave the Applicant low ratings in seven out of ten categories; his overall rating was "a staff member who maintains only a minimum standard of efficiency". The Applicant's principal supervisor noted "the extreme negligence of this staff member".

In a letter dated 6 March 1994, the Officer-in-Charge, UNRWA, SAR, informed the Applicant that "because of the unsatisfactory performance you rendered during the past year and following the less than satisfactory periodic report completed by your supervisor on 30 January 1994, it has been decided to terminate your appointment in the interest of the Agency under the provisions of staff rule 109.1, effective close of business on 6 March 1994".

The Applicant appealed this decision in a letter to the DUA, SAR, dated 22 March 1994, and requested reinstatement. On 6 April 1994, the DUA, SAR, informed the Applicant that "I have reviewed your case and the decision taken by the Officer-in-Charge of UNRWA

Affairs, Syria and regret to inform you that I am unable to accede to your request for cancellation of your termination".

On 22 July 1994, the JAB submitted its report to the Commissioner-General on the Applicant's first and second appeals. The JAB's evaluation and recommendation read, in part, as follows:

"(A) The Appellant's first appeal of 3 August 1993 against the Administration's decision to defer his annual increment due on 1 May 1993 for a period of three months:

3. ..., the Board is of the opinion that the Administration acted within the framework of standing rules and regulations; and, the Board could not establish that, based on the evidence adduced, the decision appealed from has been vitiated by prejudice or any other extraneous factors.

The Board is also of the opinion that, in accordance with the provisions of Area staff rule 111.1(3), the Board cannot consider the substantive question of the Appellant's efficiency which is a purely managerial aspect of the case.

However, the Board wishes to make the following reservations about the Appellant's periodic report dated 4 March 1993:

(a) The Board noted that, although dated 4 March 1993 with a deadline to be returned before 15 April 1993 and despite the fact that the Appellant's annual increment was due effective 1 May 1993, the report was not completed until 7 June 1993.

The Board finds that this action on the part of the Administration is not justified.

(b) The Board also noted that parts 2-4 of the report were completed by one person, namely, the Field Supply and Transport Officer. This, in the Board's opinion, infringes the Instructions for Completing a Periodic Report as set out on the report itself and in personnel directive A/14.

(B) The Appellant's second appeal of 12 September 1993 requesting upgrading of his position:

By reference to Area staff regulation 11.1(A) governing appeals, the Board resolved that it is not within its jurisdiction to entertain this appeal as the decision appealed from does not constitute an administrative decision within the meaning of the above referenced regulation.

IV. Recommendation

17. In view of the foregoing, and without prejudice to any further oral or written submissions to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation:

(a) To uphold the Administration's decision to defer the Appellant's annual increment due on 1 May 1993 for a period of three months; and that the Appellant's appeal of 3 August 1993 be dismissed, and

(b) To uphold the Administration's refusal to upgrade the Appellant's post; and that the Appellant's appeal of 12 September 1993 be rejected."

On 2 August 1994, the Officer-in-Charge, Headquarters transmitted a copy of the JAB report to the Applicant and informed him as follows:

"With regard to your appeal concerning deferment of your annual increment, you will note that the Board found that the Administration acted within the framework of standing Regulations and Rules, and that it could not be established that the administrative decision which is the subject of the appeal was vitiated by prejudice or any other extraneous factors. With regard to your second appeal concerning upgrading of your former position as Vehicle Maintenance Officer, the Board resolved that it was not within its jurisdiction to entertain this appeal, as the decision appealed from does not constitute an administrative decision within the meaning of Area staff regulation 11.1(A) concerning appeals.

Based on these findings, the Board unanimously made its recommendations to uphold the Administration's decisions in both appeals, and to dismiss your first appeal and reject the second. I accept the Board's findings and recommendations, and therefore your first appeal stands dismissed, and your second is rejected as not falling within the applicable staff regulation."

In the meantime, on 17 October 1993, the Applicant lodged an appeal with the JAB against the second deferral of his annual increment (the third appeal), which was communicated to him in a letter dated 20 September 1993 from the Field Personnel Officer. On 3 January 1994, the Applicant lodged an appeal with the JAB against the decision communicated to him in a letter dated 9 November 1993, from the Field Personnel Officer, SAR, to defer his annual increment until 30 April 1994 (the fourth appeal). On 19 April 1994, the Applicant lodged an appeal with the JAB against the 6 March 1994 decision to terminate his services in the interest of the Agency (the fifth appeal).

On 14 July 1995, the JAB submitted its report to the Commissioner-General with respect to the Applicant's third, fourth and fifth appeals. Its considerations and recommendation read, in part, as follows:

"...

A. The Appellant's personal file reflects an outstanding record of performance from the date of his re-employment in 1988 until 1993. In fact the Appellant has been rated as an efficient staff member giving rather more than average satisfaction'. He also received several letters of commendation from his supervisors on many occasions.

...

B. The Appellant's ordeal started in 1993 when he initiated complaints and objections against the quality of some commodities received by the Field Supply Division from Headquarters, Vienna, such as the Semperit tyres, Varta

batteries and VWLT40 spare parts. The Appellant's complaints were of technical nature.

The Board here noted that the Appellant refused to sign a letter dated 29 June 1993, prepared by the Field Supply and Transport Officer, and sent to the Appellant for signature. The said letter states that the Appellant confirms that 'the tyres received form Semperit on the above purchase order were new when received in August 1992 and not second hand'.

The Appellant contends that he was told by the Field Supply and Transport Officer that he would be harmed if he refuses to sign that letter.

The Board noted that the Field Supply and Transport Officer states in his letter dated 4 July 1993 addressed to the Appellant that 'I did not say you would be harmed and my comment was meant as advice not a threat'.

C. The Appellant's periodic report of 4 March 1993 was completely filled out by one person, namely, the Field Supply and Transport Officer. This report was due to be filled out by 15 April 1993. However, it was not completed until 7 June 1993, i.e. until after the visit of the Procurement Evaluation Team.

D. The Vehicle Workshop Inspector conducted his visit to Damascus Workshop in March 1993, but did not submit his report until 4 June 1993.

He states in the said report that 'In my opinion he [the Appellant] is the most incompetent VMO [Vehicle Maintenance Officer] I ever met and his performance instead of becoming better was getting far worse than anybody expected'.

This statement and the enthusiasm of its wordings, in the Board's opinion, cannot reflect neutrality.

It is also worthwhile to note here that the Vehicle Workshop Inspector criticized in his report both the Appellant (who was the Vehicle Maintenance Officer) and the Head Mechanic; the Appellant's services were terminated while the Head Mechanic was later promoted to the post of Vehicle Maintenance Officer.

E. The Administration's decision to defer the Appellant's annual increment for a second time was based on the so-

called unsatisfactory performance of the Appellant as reflected in his periodic report of 9 June 1993. By reference to this periodic report, the Board noted the following:

'(1) The report is again completed by the Field Supply and Transport Officer in all three parts of it, thus infringing the Instructions for Completing a Periodic Report as set out on the report itself and in personnel directive A/14.

(2) ...

The Board here believes that the overall rating is not consistent with the average of the ratings of Part 2 of the report.

The overall rating should have been 'a staff member who maintains a good standard of efficiency' i.e. to reflect satisfactory performance.

F. Effective close of business on 6 March 1994, the Appellant's services were terminated in the interest of the Agency.

This decision was based on the Appellant's unsatisfactory performance as reflected in his periodic report of January 1994. The Board, after examining the said periodic report, makes the following observations:

(1) All three parts of the report, as in the previous cases, are all completed by one person, again infringing the relevant instructions.

(2) The Acting Field Supply and Transport Officer completed Part 2 of the report, the part which is supposed to be completed by the immediate technical supervisor, ignoring the fact that in July 1993, the post of Technical Operations Officer was created in the Syrian Field acting as immediate supervisor to the Vehicle Maintenance Officer (the Appellant).

IV. Recommendation

25. In view of the foregoing, the Board unanimously makes its recommendation that the administrative decisions appealed against be reviewed with a view to:

A. Reinstating the Appellant in the Agency's service in his original post of Vehicle Maintenance Officer or in any other post commensurate with his qualifications, experience and previous remunerations, and

B. Paying the Appellant his entitled annual increment as of 1 August 1993, the date of its deferment."

In a letter dated 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

I have carefully reviewed the Board's report. Regarding the termination of your services in the interest of the Agency pursuant to Area staff regulation 9.1, I find that there is substantial evidence that your performance had been unsatisfactory, and that, despite repeated warnings, your performance did not improve. Therefore, I find that the termination of your services was fully supported by the evidence and was justified. Similarly, with respect to the deferral of your annual increment which you have also appealed, this administrative action is fully supported by the evidence. In view of the above, I do not accept the Joint Appeals Board's conclusions and recommendations, and the administrative decisions are upheld. Your appeal is, therefore, dismissed."

On 25 October 1994, the Applicant filed with the Tribunal the application concerning his first and second appeals. On 10 October 1995, he filed a second application concerning his third, fourth and fifth appeals.

Whereas the Applicant's principal contentions are:

1. The deferral of the Applicant's increment was improperly motivated, as it was a retaliatory measure against him for raising a concern about the quality of tyres being provided for use by the Agency.

2. The Applicant's workload has doubled, without any addition in staff. His increased responsibilities should be graded at a higher level.

3. The Applicant's annual increment was improperly deferred a second time, for a further five months.

4. The period for which the Applicant's annual increment was deferred was incorrect.

5. Termination of the Applicant's appointment was improper.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim that the deferral of his annual increment should be rescinded relates to a decision correctly taken, in accordance with the relevant provisions of the Area Staff Rules. The Applicant's contention that deferral of his increment was related to the "tyres issue" was not raised in his appeal to the JAB and is therefore not properly before the Tribunal.

2. The failure to agree to the Applicant's request that his post be graded at a higher level does not constitute an administrative decision and is therefore not reviewable. The Applicant's request that his former post description be reinstated is not properly before the Tribunal as it was not raised before the JAB.

3. Termination of the Applicant's services was in the interest of the Agency.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant, who was a Vehicle Maintenance Officer (VMO), grade 12, working for UNWRA (the Agency) on a temporary indefinite contract in the Syrian Arab Republic (SAR), has lodged five appeals contained in two separate applications that are before the Tribunal

as cases No. 820 and No. 880. The Applicant's first appeal is against the decision of the Agency, dated 10 June 1993, to withhold the Applicant's annual increment that was due on 1 May 1993. The second appeal is against the revised description of the Applicant's post, which the Applicant alleges is a breach of his contract. The Applicant characterizes his third appeal as being in connection with the second deferral of his annual increment. The fourth appeal is related to the unannounced deferral of his annual increment for one month and the fifth appeal is against his separation from service. In its report of 2 August 1994, covering the Applicant's first two appeals, the Joint Appeals Board (JAB) dismissed the appeal contesting the deferral of the Applicant's annual increment, since it found that the Agency had not acted with prejudice. The JAB rejected the Applicant's appeal contesting the revision of his post description as Vehicle Maintenance Officer, ruling that it was beyond the scope of the JAB's jurisdiction. In its report of 14 August 1995, covering the third through fifth appeals, the JAB found that the Administration's actions were not in conformity with standing rules. It recommended that the Applicant be reinstated and that his annual increment be paid. Notwithstanding the JAB's findings, the Applicant contests the characterization of his appeals as interrelated. The Tribunal does not agree with the Applicant on this point. On the contrary, the Tribunal finds that these appeals are closely related to each other and will deal with them in a single judgement.

II. The question presented is whether the Applicant was subject to discrimination resulting from the decisions of the Administration to defer successively the Applicant's annual increments, to revise the description of his post and, ultimately, to terminate his appointment. The Applicant contends that the Administration's actions against him come as a direct result of his submission of a report detailing the inferior quality of vehicle tyres, which the

Applicant believes were stealthily renovated and passed off as new, and the existence of counterfeit spare parts. The Respondent maintains that the deferrals of the Applicant's annual increments were proper, since these decisions were taken in accordance with Area staff rule 103.2. Under that rule, annual increments will be given only to those staff members whose service has been satisfactory. In support of this position, the Respondent points to the Applicant's periodic evaluation report (PER) dated 4 March 1993, in which the Applicant is rated overall as "a staff member who maintains only a minimum standard of efficiency." In addition, the Respondent refers to a report made by the Vehicle Workshop Inspector, dated 4 June 1993, decribing the Applicant as "the most incompetent VMO I ever met." The JAB found, however, that this PER, like the two PERs following it, was completely filled out by one person, the Field Supply and Transport Officer. This infringed the Instructions for Completing a Periodic Report that were set out in the report itself and in personnel directive A/14. In addition, the JAB found that although dated 4 March 1993 and despite the fact that the Applicant's annual increment was due on 1 May 1993, the PER was not completed until 7 June 1993. The JAB also disagreed with the overall rating for the Applicant. The Tribunal agrees with the JAB's finding that the PERs were not completed properly or in a timely manner. It also notes the JAB's finding that until 1993, the Applicant received favourable performance evaluations.

The Respondent also submits that the Applicant did not raise with the JAB the issue of the quality of tyres used on the Agency's vehicles as being the reason behind the Agency's decision to defer his annual increment. The Respondent contends that this issue is therefore not properly before the Tribunal. (Judgement No. 624, Muhtadi, (1993)). The Tribunal finds, however, that the issue of discrimination was raised by the Applicant in his communications with the Agency concerning the deferral of his annual increment and that, consequently, the issue is properly before the Tribunal.

III. With respect to the revision of the Applicant's post description, the Applicant maintains that the new description adds many duties to his current responsibilities, effectively doubling his work. Before the JAB, the Applicant requested a review of the "decision" not to promote him to a higher grade in view of the new post description. Before the Tribunal, the Applicant requests a rescission of the new post description. The Respondent contends that, because the question of whether there were grounds for the revision of the Applicant's post description was not an issue before the JAB, it should not be considered by the Tribunal. (Judgement No. 624, Muhtadi (1993)). Further, the Respondent maintains that even if this issue were properly before the Tribunal, there are no grounds for rescission of the new post description since the Tribunal may not, in matters relating to job classification, substitute its judgement for that of the Agency. Its review is limited to considering whether there has been a "material error in procedure or substance". The Tribunal finds that the issue is properly before it, in that in requesting a review by the JAB of the decision not to promote the Applicant, the question of post description arose. The Tribunal finds that there has not been a "material error in substance or procedure" with respect to the revision of the Applicant's post description and therefore rejects the request for its revision.

IV. As to the termination of the Applicant's services, the Applicant contends that this is the culmination of a "chain of unjust actions", motivated by bias and prejudice. He maintains that the evaluations of his performance were part of a conspiracy to silence him. The Respondent argues that the onus is on the Applicant to demonstrate that the administrative decisions of which he complains were motivated by prejudice, bias or extraneous factors, but that he has failed to do so. The Respondent maintains that the Applicant's services were terminated for unsatisfactory

performance. The Tribunal, taking account of all the circumstances of the case, considers that the decision of the Secretary-General is within the scope of his discretion.

V. However, as the JAB points out, there were certain procedural irregularities with respect to the evaluation of the Applicant's performance, for which he is entitled to compensation. The Tribunal assesses its amount at $1,000.

VI. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay the Applicant $1,000.

(2) Rejects all other pleas.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 778

Case No. 841: CHU

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Mondfeld S. Chu, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 28 February 1995;

Whereas, on 25 February 1995, the Applicant filed an application requesting the Tribunal, inter alia:

> "... to ... reverse the Pension Board's erroneous judgement [not to place the Applicant on the United Nations Joint Staff Pension Fund (UNJSPF) two-track pension adjustment system].
>
> [To find that the Applicant is] rightfully entitled to the exchange rate which existed at the time of my retirement from the United Nations (approximately 1 US$ to 4 NT$ [New Taiwan Dollars]), and to have this rate protected from subsequent erosion via the safeguards of the UNJSPF two-track system of pension adjustment. Hereafter, my pension payments should reflect the real value of the US dollar amount vis-à-vis the NT dollar that existed at the time of my retirement. The amount of compensation should be determined by calculating the difference in pension benefits that I would have received had the proper exchange rate been established at the time of my retirement. Later fluctuations should be adjusted accordingly by referring to the local currency track that needs to be established for UNJSPF beneficiaries who

reside in Taiwan. I only seek retroactive payment dating back to November 12, 1992, which was the date of my initial request for relief."

Whereas the Respondent filed his answer on 18 August 1995;

Whereas, on 11 July 1996, the Tribunal requested the Respondent to provide answers to certain questions, which the Respondent provided on 19 July 1996;

Whereas, on 22 July 1996, the Respondent provided a revised set of answers to the Tribunal's questions of 11 July 1996;

Whereas, on 6 August 1996, the Tribunal notified both the Applicant and the Respondent that it had adjourned consideration of the case until its next session, commencing on 22 October 1996;

Whereas, on 12 September 1996, the Respondent filed a further submission with the Tribunal;

Whereas, on 12 October 1996, the Applicant filed a response to the Respondent's written statement of 12 September;

Whereas the facts in the case are as follows:

The Applicant served the United Nations as an Interpreter in the Department of Conference Services from 1969 to 1981. He retired from service on 3 January 1981. His pension benefit commenced on 4 January 1981. Upon retirement, he moved from New York to Taiwan.

On 12 November 1992, the Applicant wrote to the United Nations Joint Staff Pension Fund (UNJSPF), noting that, as a result of the declining value of the US dollar in relation to the New Taiwan dollar, "I have in effect taken a 37.5% cut in my pension". He requested that "an adjustment be made in my monthly pension payments to compensate for the depreciated US dollar". On 7 April 1993, he wrote to the UNJSPF again, requesting "prompt attention into this matter".

In a reply dated 3 June 1993, the Secretary of the UNJSPF noted: "[Y]our pension benefit has been established solely in US dollars and is adjusted on an annual basis on 1 April, in accordance

with the movement of the consumer price index of the United States ..." He advised the Applicant that "[u]nfortunately, adjustments in the pension benefit, due to exchange rate fluctuations, cannot be made for pensioners who claim the United States as their country of residence but who actually live elsewhere, in your case Taiwan."

In August 1993, the Applicant replied to the Secretary of the UNJSPF, "I would like to make it unequivocally clear that I have never in the past nor in the present, made any such claim that the United States was my country of residence". He noted that during his employment, he had returned to Taiwan for home leave, that upon retirement he had received a repatriation grant and that he had promptly informed the Pension Board of his residential address in Taiwan. He enclosed further documentation of his residence in Taiwan.

In a reply dated 30 September 1993, the Secretary of the UNJSPF noted that the Applicant's benefit had been established in US dollars upon his separation, and that "[i]n view of the fact that you had not provided proof of residence in Taiwan, a local currency track for that country was not established". He stated that, within six weeks, he would provide the Applicant with "estimated amounts of your benefit under the two-track feature of the revised Pension Adjustment System".

On 13 January 1994, the Secretary of the UNJSPF advised the Applicant that his letter of 30 September 1993 had been "a standard reply" which "failed to take into account the particular circumstances of your place of residence with respect to which: (a) no UN operational exchange rate exists between the US dollar and the local currency; (b) there is no relevant UN post adjustment classification that could be used to calculate a cost of living differential factor for determining the local currency base amount of your benefit; and (c) no consumer price index is published in the 'UN Monthly Bulletin of Statistics' or specified by the United Nations Statistical Division." For these reasons, he stated

"a local-currency track could not be established for your place of residence under the UNJSPF Pension Adjustment System".

On 9 June 1994, the Applicant appealed this decision in a letter to the Deputy Secretary, UNJSPF, contending that the "data and statistics which are required to establish a local currency track are readily available," and their absence from UN publications "should not be allowed to stand as the justification for depriving me of the right to have a two-track pension adjustment, which is provided for other retirees."

On 16 August 1994, the Secretary of the United Joint Staff Pension Board (UNJSPB) informed the Applicant that his appeal had been considered by the Standing Committee of the UNJSPB on 28 July 1994 and that the decision of the Secretary had been upheld. He stated: "By its resolution 2758 of 25 October 1971, the UN General Assembly had recognized the People's Republic of China as the sole lawful representative of China in the United Nations; consequently, and as affirmed by the UN Legal Counsel, Taiwan is considered to be part of the territory of China, constituting one of the provinces of the People's Republic of China. Accordingly, under the UNJSPF pension adjustment system, your UNJSPF retirement benefit (R/21787) will continue to be established and adjusted solely on the basis of the US dollar track".

On 25 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The purpose of the UNJSPF Pension Adjustment System is to protect the pension benefits of UN retirees from erosion. There is no requirement that the country of residence be a Member State of the UN.

2. The Applicant should not be denied the same rights to pension adjustment that other retirees are able to enjoy. A retiree should not be penalized for his or her choice of residence.

Whereas the Respondent's principal contentions are:

1. Under the terms of resolution 2758/XXVI of 25 October 1971, the Applicant's country of residence cannot be treated in the way he would wish. The remedy he seeks would require a decision by the General Assembly.

2. The Applicant, having served as a UN staff member for many years, was, or should have been, aware of the status of the area in which he chose to retire.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant was employed as a Translator in the Organization from 1969 to 1981. He has resided in Taiwan since his retirement and receives a pension calculated in US dollars. The Applicant asserts that, due to the currency fluctuations between the US dollar and the New Taiwan dollar, the purchasing power of his pension has diminished, causing substantial loss in its value. The Applicant requests that the UN Joint Staff Pension Fund (UNJSPF) establish a local track for Taiwan, based on Taiwan currency, within its two-track pension adjustment system. The "local currency track" aims to protect pension beneficiaries residing outside the United States against fluctuations in the US dollar vis-à-vis their local currency. The Applicant's request for the establishment of a local currency track for Taiwan was rejected by the Standing Committee of the UNJSPB at its meeting on 28 July 1994.

II. The Respondent contends that a two-track pension adjustment system based on Taiwan currency cannot be established as Taiwan is considered by the UN to be part of the People's Republic of China.

III. The facts in this case are not in dispute. The Tribunal notes that the "local currency track" takes account only of those countries that are recognized by the United Nations. To grant the Applicant's request would mean establishing a specific pension regime for Taiwan, as though the latter were a State recognized by the United Nations. To do so, however, would contravene General Assembly resolution 2758/XXVI, which states that the United Nations considers Taiwan to be part of China, whose only representative is the People's Republic of China.

General Assembly resolution 2578/XXVI governs the Respondent's application of the Pension Fund Regulations since, as a subsidiary organ of the General Assembly, the UNJSPF is bound to follow the determinations made by the General Assembly in such matters.

IV. The Tribunal notes, in addition, that the calculation of a hypothetical rate of exchange between the US dollar and the New Taiwan dollar would confront the UNJSPF with an array of problems since it has no practical means of measuring consumer price index factors for Taiwan based on its currency, as it has no figures available for Taiwan (e.g., UN Operational Rate of Exchange, Consumer Price Index or Post Adjustment Relativities). Moreover, the Tribunal wishes to point out that the creation of a local currency track for Taiwan and the application of the hypothetical conversion rate for such track to the Applicant's pension would not necessarily inure to the Applicant's advantage in the future -- for example, if the value of the US dollar were to rise against the value of the New Taiwan dollar.

V. While the Tribunal is sympathetic to the difficulties facing the Applicant, it can find no basis on which to grant him relief.

VI. For the foregoing reasons, the application is rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/779
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 779

Case No. 845: MAIA-SAMPAIO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Leonor Maia-Sampaio, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 28 February and 30 April 1995;

Whereas, on 20 March 1995, the Applicant filed an application requesting the Tribunal that:

> "(a) She be given financial compensation commensurate with the financial loss suffered by not being given proper consideration for the vacant P-5 post in the JIU [Joint Inspection Unit];
>
> (b) The post in the JIU be readvertised and the Appellant be permitted to re-apply for the position;
>
> (c) The provisions of staff rule 112.3 be applied so that those who violated the United Nations Rules and Regulations be made liable for any financial consequences for the Organization resulting from such violation;
>
> (d) Such other and further relief as the Tribunal feels just and proper in the circumstances."

Whereas the Respondent filed his answer on 29 June 1995;

Whereas the Applicant filed written observations on 15 August 1995;

Whereas, on 3 July 1996, the Applicant filed additional documents with the Tribunal;

Whereas, on 8 July 1996, the Tribunal requested the Respondent to provide answers to certain questions, which he did, on 12 and 18 July 1996;

Whereas, on 23 July 1996, the Applicant submitted additional documents in response to the Respondent's submission of 18 July 1996;

Whereas, on 25 July 1996, the Respondent submitted additional documents in response to the Applicant's submission of 23 July 1996;

Whereas, on 30 July 1996, the Applicant submitted an additional document to the Tribunal;

Whereas, on 5 August 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 17 September 1996;

Whereas, on 5 August 1996, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 19 August and 12 September 1996, the Applicant submitted additional documents to the Tribunal;

Whereas, on 18 September 1996, the Respondent submitted an additional document in response to the Applicant's submissions of 12 September 1996;

Whereas, on 20 September 1996, the Respondent submitted a memorandum to the Tribunal in connection with the Applicant's memorandum of 19 August 1996;

Whereas, on 25 September 1996, the Applicant submitted an additional document in response to the Respondent's submission of 18 September 1996;

Whereas, on 9 October 1996, the Applicant submitted an additional document to the Tribunal in response to the Respondent's submission of 20 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 January 1970, as Associate Librarian in the Department of Conference Services, on a three-month fixed-term appointment at the P-2, step I level. Her appointment was successively extended for periods of eight months, two months, ten months and one year. On 1 July 1973, she was granted a probationary appointment, and on 1 April 1974, a permanent appointment. On this date, the Applicant was transferred to the Division of Human Rights in Geneva. On 1 April 1977, she was promoted to the P-3 level. On 17 May 1980, the Applicant was transferred back to Headquarters as Secretary, Advisory Board on Compensation Claims, in the Office of Financial Services. On 1 April 1983, she was promoted to the P-4 level. On 1 September 1987, the Applicant was reassigned to the Central Evaluation Unit, as Budget Officer. The Applicant was assigned to Geneva on 14 January 1989, as Programme Budget Officer in the Special Procedures Section of the Centre for Human Rights. She returned to Headquarters on 1 July 1990, as Evaluation Officer, Central Evaluation Unit, Department of Administration and Management.

On 16 March 1992, the Assistant Secretary-General for Human Resources Management (OHRM) listed in ST/IC/1992/21 all vacant professional posts to be filled in accordance with ST/AI/373 of 25 December 1991, on Placement and Promotion. These posts were vacant or likely to become vacant on or before 31 December 1992. Among them was the P-5 post of Senior Research Officer, Joint Inspection Unit (JIU), in Geneva.

In March 1992, in response to Vacancy Announcement VA 93-A-009-GE, the Applicant and 28 other staff members applied for this post. In a memorandum dated 20 August 1992, to the Director of

the Recruitment and Placement Division, OHRM, the Applicant reiterated her interest in the post.

The UNOG Departmental Panel set up to consider the candidates concluded that only two staff members, Ms. X and Mr. A, were fully qualified for the post.

The JIU considered the applicants for the post. In a memorandum dated 24 June 1992, the Executive Secretary informed the Chief Personnel Service, UNOG, that the JIU recommended Mr. A for the post. On 4 September 1992, the Director General, UNOG, transmitted this recommendation to the Assistant Secretary-General, OHRM.

On 2 November 1992, the Appointment and Promotion Board (APB) considered the candidates for the post. It noted that, as the candidate recommended by the JIU was to be transferred to another P-5 post, he was no longer interested in the JIU position. The APB requested the Acting Director of Personnel to contact the JIU regarding the selection by the JIU of the other candidate, Ms. X, who had been recommended by the UNOG Departmental Panel.

At the JIU's request, the post was re-advertised, in vacancy announcement 93-A-JIU-009-GE, with a deadline for applications of 17 May 1993.

In a memorandum dated 9 June 1993, to the Acting Director of Personnel, the Director, Division of Administration, after recounting the steps taken in connection with recruitment for the post, reported that "in late January or early February 1993 the Chairman of the JIU visited me at Headquarters and informed me that she had consulted the JIU and that it had been agreed to accept [Ms. X] if placed on the P-5 Register." In June 1993, an Information Circular was issued containing the 1992 Senior Officer (P-5) Promotion Register, which included the name of Ms. X, but not that of the Applicant.

On 14 July 1993, the Senior Recruitment and Placement Officer, Professional Staffing Service, OHRM, informed the Chief of

Recruitment, UNOG, that the vacancy announcement for the post had elicited 73 applications, 26 of which were internal. He listed 15 internal candidates, including Ms. X, as meeting all of the requirements of the post, and he listed 6 internal candidates, including the Applicant, as meeting "most of the requirements of the post". He requested the comments of the JIU in respect of the candidates.

In a memorandum dated 6 August 1993, entitled "Promotion of [Ms. X]: post No. UNB-3481-P-5-002, Senior Research Officer, JIU", the Director, OHRM, informed the Chief, Personnel Administration Section, UNOG, that, the Chairman of the JIU reported that the JIU had agreed to accept Ms. X if she was placed on the P-5 Promotion Register. He added that the APB had recommended her and her name had been placed on the Promotion Register. She noted that consequently, "the P-5 post cannot be considered as available for external circulation ... and OHRM has decided to withdraw the vacancy announcement so that the post can be used to accommodate [Ms. X]'s transfer and promotion." She requested that action be initiated to effect the transfer and promotion and that the JIU be informed accordingly.

In a letter dated 26 August 1993, the Chairperson of the JIU informed the Director, OHRM, that she never said either that she had consulted the JIU or "that it had been agreed to accept [Ms. X] if placed on the P-5 Promotion Register." She noted that the Inspectors had studied her memorandum of 6 August 1993 to the Chief of Personnel Administration Section, UNOG, cited above, and had concluded that it was not in conformity with either the JIU Statute or the established practice of the Unit, whereby the Inspectors "independently select and recommend, for appointment by the Secretary-General, the staff they judge most qualified ..." In the case of Ms. X, she noted that, during the 1992 promotion exercise, her candidature had been evaluated, and the evaluation had revealed that she "does not possess all the JIU requirements for optimal performance against the P-5 post which requires, among others, full

mastery of the French language." Finally, she referred to the list of candidates that had been forwarded to the JIU in July and informed the Director that the Inspectors had decided to support another candidate.

In a letter to the Director, OHRM, dated 21 October 1993, the Applicant noted that more than two years had passed since she had applied for the JIU post and that she "was not given proper consideration for the post due to the fact that OHRM was pushing another candidate." She requested the Director to investigate the situation and to prevent the post from being filled by an unsuitable candidate. On 2 November 1993, the Applicant again wrote to the Director, OHRM.

In a memorandum dated 8 November 1993, to the Chairperson of the JIU, the Director of OHRM "confirmed [their] agreement" concerning the filling of a number of vacancies in the JIU Secretariat. As regards the post in dispute, the memorandum recites that: "Ms. [X]'s promotion is to be implemented against the P-5 post (...)."

On 5 November 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB) requesting suspension of action on filling the JIU post. The JAB adopted its report on 18 November 1993, recommending that "all action regarding the above mentioned promotion to the P-5 post in the Joint Inspection Unit be suspended pending the completion of the appeal." On 29 November 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General "has determined that procedurally your request was not properly before the Board as you had not met the requirements of staff rule 111.2(a), [i.e.] the submission of a request to the Secretary-General for administrative review." He further stated "even if your suspension request were properly before the Board, the decision contested has been implemented and therefore the requirement of staff rule 111.2(c)(ii) has not been met."

On 9 December 1993, the Applicant requested the Secretary-General to review the decision not to include her name in the P-5 Promotion Register. On 15 December 1993, she requested the Under-Secretary-General for Administration and Management to review the decision to reject the JAB recommendation for suspension of action. On 6 January 1994, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 4 August 1994. Its considerations, findings and recommendation read in part as follows:

> "... The Panel ... concluded that the established procedure applicable to placement/promotion had been followed in the case of the Appellant.
>
> 50. However, the Panel observed that a number of irregularities were made and a certain confusion existed in the procedure leading to the contested decision. In that regard, however, it noted that in its Judgement No. 116, Josephy, the Administrative Tribunal had considered that although procedural irregularities were to be regretted, it was 'of the opinion that they are not such as to affect the validity of the decision ... which, as stated above, otherwise complied with the conditions of substance set forth in the Staff Regulations and Rules'. The Panel was of the view that even in the absence of those irregularities and confusion, nothing proves that the Appellant would have been promoted and assigned to the post in the JIU, especially in view of the fact that she was not mentioned by the JIU as a fully qualified candidate for the post.
>
> 51. The Panel then considered the question of due process and prejudice. It noted that the Appellant had produced no direct evidence that prejudice or other extraneous factors had played any role in reaching the contested decision. It was therefore of the opinion that in spite of the irregularities and confusion mentioned in paragraph 50 above, the contested decision did not violate the requirement of due process.
>
> Findings and recommendation
>
> 52. The Panel unanimously:

(a) Finds that proper procedure was followed in the advertisement of the vacancy in the JIU;

(b) Finds that the Appellant was properly considered for the post in JIU regarding the Appellant, in spite of irregularities and confusion, as these irregularities and confusion were not such as to justify the invalidation of the contested decision;

(c) Finds that the contested decision was not tainted by prejudice or some other extraneous factors.

53. The Panel unanimously recommends that the appeal be rejected."

On 10 August 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and has taken note of its findings that the proper procedure was followed in the advertisement of the vacancy in the Inspection Unit, that in spite of irregularities and confusion, you were properly considered for this post, and that the contested decision was not tainted by prejudice or some other extraneous factors. He has also taken note of the Board's recommendation that your appeal be rejected. The Secretary-General has accordingly decided to take no action in respect of your appeal."

On 20 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given fair consideration for a post to which she was entitled under the Staff Rules and Regulations and for which she was eminently qualified.

2. The Director, OHRM, unfairly and improperly engineered another staff member's career development to the detriment of other staff members, particularly the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-selection to the post in question.

2. The decision not to select the Applicant for the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 5 to 26 July 1996 in Geneva and from 25 October to 21 November 1996 in New York, now pronounces the following judgement:

I. From the information before it, the Tribunal understands that the usual practice for appointment of staff to serve with the Joint Inspection Unit (JIU) is as follows: the Office of Human Resources Management (OHRM) transmits to the JIU a list of applications, following the relevant vacancy announcement.

The JIU reviews these applications and makes its recommendations. The UNOG Departmental Panel again reviews the candidates and informs the JIU of its choice. In the light thereof, the JIU ratifies or modifies its initial recommendation.

The next step in the selection process is the review by the Appointment and Promotion Board (APB), followed by the appointment of the successful candidate.

It is the Tribunal's task to determine, in the first place, whether the regular procedure was followed in this case and whether the Applicant's right to be fully and fairly considered was respected. The vacancy announcement drew 29 applicants. According to the established practice, their names should have been communicated to the JIU. There is no record that this actually took place. Nevertheless, whether or not it was in possession of the list of all the candidates, the JIU recommended Mr. A. for the post.

The chronology of events submitted to the Tribunal shows that on 9 June 1992 "UNOG Departmental Panel meets to consider the recommendation submitted by the JIU Secretary for the selection of [Mr. A]." In the minutes of this meeting, it is stated that "the Panel carefully considered the qualifications and experience of all the candidates on the basis of the criteria listed in paragraph 22 of ST/AI/378 and in the light of the particular requirements contained in the job description."

The UNOG Departmental Panel considered the candidates for the post. It concluded that two candidates, Mr. A and Ms. X, were fully qualified for the post.

While not fully satisfied with any of the candidates, the JIU expressed its preference for Mr. A.

The UNOG Departmental Panel suggested that the JIU give further consideration to Ms. X in the light of her qualifications and experience and in view of ST/SGB/252 of 20 October 1992 (now superseded by ST/SGB/282 of 5 January 1996) on the Improvement of the Status of Women in the UN Secretariat.

However, the JIU maintained its recommendation of Mr. A. This recommendation was approved by Headquarters and submitted to the APB. When the APB was considering the recommendation, it was informed that Mr. A was being transferred to another post. The APB then recommended Ms. X. The JIU did not accept this recommendation and asked that the post be re-advertised.

II. A new selection process for the post was instituted. The vacancy was announced, pursuant to Vacancy Announcement 93-A-JIU-009-GE. Seventy-three candidates applied, including the Applicant. She alleges that she was not considered properly for the post, because OHRM was actively favouring Ms. X's candidacy.

The Applicant bases this charge on information given by the Director of OHRM to the APB, that the Chairperson of the JIU had said that she had consulted members of the JIU and that it had been

agreed to accept Ms. X without resorting to a new selection process. In a communication dated 26 August 1993, to the new Director, OHRM, cited below, the Chairperson of the JIU denied that she had said this to the Director, OHRM. An affidavit of the former Secretary of the JAB is of assistance in this matter. It states that she had known the Chairperson of the JIU for a long time, and had been contacted by her for advice on the correct procedures for staffing the JIU Secretariat.

The Chairperson of the JIU told the former Secretary of the JAB that the Director, OHRM, had informed her that Ms. X had been recommended by the APB to fill the JIU post and that the matter was no longer in the hands of OHRM or the JIU. She further indicated to the former Secretary of the JAB that, when she pressed OHRM to take action on the P-5 post and other pending matters, she was given to understand that no personnel actions would be effected so long as the JIU resisted taking Ms. X for the P-5 post.

III. For this reason, the Applicant contends that she was not given fair consideration for a post for which she was qualified and for which she applied. Her right to consideration was violated. She claims that the possibility of her promotion to the P-5 level was being obstructed by the actions of the Director, OHRM, in order to favour another candidate. The Applicant claims that proper procedures were not followed, and that the Director, OHRM, misled the APB by informing it that the JIU post was available for the promotion of Ms. X.

IV. The Respondent argues that the staff shall be appointed by the Secretary-General under regulations established by the General Assembly; that appointments and promotions are within the discretion of the Secretary-General and that the Tribunal cannot enter into the merits of these issues.

The Respondent further argues that the Applicant was given full and fair consideration for the post. He refers to the substantial difference between the Director, OHRM's account of events and that described in the former Secretary of the JAB's affidavit. He maintains that it is not possible to determine with certainty who said what to whom. The Respondent also contends that, in any event, any difference in perception, as the Respondent describes it, did not affect the consideration given to the Applicant for the post, because the JIU's choice for the post was somebody entirely different, and not the Applicant.

V. The Tribunal notes that the second vacancy announcement concerning the P-5 post was withdrawn by OHRM so that Ms. X's transfer and promotion could be implemented. This step must be examined to see whether it was taken on the basis of inaccurate and misleading information, resulting in the disregard of the Applicant's rights. Therefore, the conflicting accounts of the Chairperson, JIU, and the Director, OHRM, must be examined.

VI. The Tribunal accepts the contents of the affidavit by the former Secretary of the JAB, as representing the reality of the situation. The Tribunal finds that the Chairperson, JIU, did not agree to the selection of Ms. X for the vacant post. This is confirmed in her statement, dated 26 August 1993, to the successor to the Director of OHRM:

> "May I also clarify that I never said to [the Director, OHRM] that I had 'consulted the JIU and that it had been agreed to accept [Ms. X] if placed on the P-5 Promotion Register'.
>
> At their meeting of 24 August 1993 the Inspectors, having carefully studied the substance of your above-mentioned memorandum, concluded that it was neither in conformity with article 19, paragraph 2, of the JIU Statute which provides that the Unit's staff will be appointed by the

> Secretary-General after consultation with the Unit, nor consistent with the practice established since the inception of the Unit, whereby the Inspectors, following receipt of candidatures from the UN Administration, independently select and recommend, for appointment by the Secretary-General, the staff they judge most qualified to assist them in the discharge of their highly complex inter-agency responsibilities.
>
> Neither procedure was followed in the case of [Ms. X]. ..."

VII. The Chairperson of the JIU's denial that she told the Director, OHRM, that she had consulted other members of the JIU is not made in isolation. It is made in the context of allegations of other difficulties. According to the affidavit from the former Secretary of the JAB, she says that the Director, OHRM, told the Chairperson, JIU, that the appointment was out of their hands. She speaks of not receiving applications for the post, and she says that she was subjected to pressure to accept Ms. X.

The statement by the successor to the Director, OHRM, as reported by the former Secretary of the JAB in her affidavit, that the matter had been handled wrongly by her predecessor for reasons that she could not fathom, must also be taken into account.

VIII. While the Secretary-General's discretion in matters of promotion and appointment is unquestioned, and while the Tribunal does not seek to substitute its own judgement for his, the situation disclosed here raises the question of whether proper procedures were followed, of whether extraneous matters were brought to bear on the selection process, and of whether the decision was made on the basis of inaccurate information.

IX. It cannot be said that the Applicant would have obtained the post even if the procedures relating to the selection for the post after the issuing of the second vacancy announcement, had not been

defective. Nonetheless, the Applicant has established, to the satisfaction of the Tribunal, that the procedures were flawed due to the highly improper interference in the process by the Director, OHRM, with the objective of promoting the appointment of Ms. X, to the detriment of all other candidates and the selection process as a whole. This impropriety violated the Applicant's right to full and fair consideration for the post.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant $5,000.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/780
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 780

Case No. 854: MAIA-SAMPAIO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Francis Spain;

Whereas, at the request of Leonor Maia-Sampaio, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January and 30 April 1995, the time-limit for the filing of an application with the Tribunal;

Whereas, on 13 April 1995, the Applicant filed an application requesting the Tribunal to order:

> "1. Retroactive reclassification of [her] post and implementation of her promotion as of that date.
>
> 2. Compensation in an amount equal to one year's salary for the delay in carrying out the above."

Whereas the Respondent filed his answer on 6 November 1995;

Whereas the Applicant filed written observations on 10 May 1996, in which she further requested the Tribunal to order:

> "...
>
> (b) The award of exemplary damages that would discourage the Administration from similar attempts at discriminatory manipulation of the classification of posts."

Whereas, on 12 September 1996, the Applicant filed an additional document with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 January 1970, as Associate Librarian in the Department of Conference Services, on a three-month fixed-term appointment at the P-2, step I level. Her appointment was successively extended for periods of eight months, two months, ten months and one year. On 1 July 1973, she was granted a probationary appointment, and on 1 April 1974, a permanent appointment. On this date, the Applicant was transferred to the Division of Human Rights in Geneva. On 1 April 1977, she was promoted to the P-3 level. On 17 May 1980, the Applicant was transferred back to Headquarters as Secretary, Advisory Board on Compensation Claims, in the Office of Financial Services. On 1 April 1983, she was promoted to the P-4 level. On 1 September 1987, the Applicant was reassigned to the Central Evaluation Unit (CEU), as Budget Officer. The Applicant was assigned to Geneva on 14 January 1989, as Programme Budget Officer in the Special Procedures Section of the Centre for Human Rights. She returned to Headquarters on 1 July 1990, as Evaluation Officer, CEU, Department of Administration and Management (DAM).

In April 1991, the Applicant prepared a request for reclassification to the P-5 level of the P-4 post of Programme Officer, UNA-28833-E-P-4-001, which she encumbered. The request was approved by the Chief, CEU/DAM, and forwarded to the Executive Office, DAM.

On 19 July 1991, the Acting Executive Officer, DAM, returned the request for classification on the grounds that no provision for such reclassification had been included in the proposed 1992-1993 programme budget. She noted that unless an existing P-5 post could be identified to implement the reclassification, DAM could not support the request.

On 19 August 1991, the Acting Executive Officer, DAM, sent a memorandum to the Applicant in which she stated, inter alia:

> "[S]ince the Chief of the Compensation and Classification Service has confirmed that his office is unable to entertain a request of this nature, which is not accompanied by a specifically identified higher level post which can be substituted for the P-4 post under consideration, ... the Department is ... unable to support your request for re-classification."

On 28 August 1991, the Applicant requested the Secretary-General for a review of the decision not to transmit her request for reclassification to the Office of Human Resources Management (OHRM). On 30 October 1991, the Applicant filed an appeal against that decision with the Joint Appeals Board (JAB). The JAB adopted its report on 12 May 1992. Its considerations, findings, and recommendation read, in part, as follows:

> "Considerations
>
> 36. The Panel observed that this case did arise from an appeal against an administrative decision not to forward to the Compensation and Classification Service the Appellant's request for reclassification of her post to the P-5 level in spite of the fact that her request had been endorsed by her Director.
>
> 37. The Panel observed that the contested decision was based on the memorandum, dated 16 August 1988, from the Assistant Secretary-General, OHRM, to the Heads of Departments and Offices, on administrative instruction ST/AI/277, dated 10 November 1980, and on administrative circular ST/IC/81/13, dated 4 March 1981.
>
> ...
>
> 40. The Panel ... found that ... while the Executive Office considered that the request could not be forwarded to the Compensation and Classification Service, the Administrative Review Unit did not hesitate to transmit it to that service for their comments. In addition, the Executive Office and

the Administrative Review Unit did not base the contested decision on the same criteria.

41. The Panel could not, therefore, escape the impression that the Appellant had been denied due process.

42. At the same time, the recommendation of the Panel is in no way intended to preclude, or substitute for, the forthcoming judgement of the Compensation and Classification Service on substantive issues such as evaluation and comparison of job descriptions contained in requests for reclassification.

Conclusions and Recommendation

44. The Panel unanimously

(a) Finds that the contested decision was based on a memorandum which had not been circulated to staff members and on administrative issuances which lack in clarity;

(b) Finds that there exist inconsistencies in the Administration's approach and criteria used in the present case;

(c) Finds therefore that the Appellant was deprived of due process.

45. Consequently, the Panel unanimously recommends that the Appellant's request for reclassification be forwarded to the Compensation and Classification Service, in accordance with the usual procedure.

46. The Panel makes no further recommendation in support of the appeal."

On 10 June 1992, the Assistant Secretary-General, OHRM, informed the Applicant as follows: "The Secretary-General ... has decided to accept its [the JAB] recommendation that your request for reclassification be forwarded to the Compensation and Classification Service, which is requested to proceed with the classification of your post".

On 16 March 1993, the Chief, Compensation and Classification Service, informed the Controller, Office of Programme Planning,

Budget and Finance, that the Compensation and Classification Service had conducted a classification review of the post in question and concluded that its reclassification from the P-4 to the P-5 level was not warranted. He noted that the Applicant could appeal the classification decision.

On 3 June 1993, the Applicant appealed to the Acting Director of OHRM against the classification of her post at the P-4 level.

On 5 October 1993, the Applicant was informed by the Director of Personnel, OHRM, that the Classification Appeals and Review Committee (CARC) had been constituted.

On 18 February 1994, the Secretary of the CARC sent the Applicant a copy of the report on the classification of her post prepared by the Compensation and Classification Service and submitted to the CARC. On 7 March 1994, the Applicant submitted her comments thereon to the CARC.

On 7 July 1994, the Director of Personnel, OHRM, transmitted to the Applicant the CARC report which recommended that the classification decision with respect to her post be maintained. She informed the Applicant that she approved the CARC's recommendation.

On 13 April 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The classification of the Applicant's post has been tainted by prejudice, which is evidenced by the minimization of the ratings given to her functions. If the Applicant's functions had been fully credited, her post would have been classified at the P-5 level.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal against the classification of her post was properly considered by the CARC, which accorded due process to the Applicant. The CARC delivered a reasoned recommendation. Its acceptance did not violate the Applicant's rights.

2. The decision not to reclassify the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 25 October to 21 November 1996, now pronounces the following judgement:

I. The Tribunal emphasizes that the only matter under consideration is the decision not to classify the Applicant's post at the P-5 level, which was communicated to her by the Director of Personnel, Office of Human Resources Managment, on 7 July 1994.

Initially, the Applicant had submitted a recourse against the Administration's decision not to process her request for the reclassification of her post. This recourse had a favourable outcome for the Applicant, since the Secretary-General accepted the Joint Appeals Board (JAB) recommendation that her request be granted. This closed one aspect of the case.

II. Accordingly, the reclassification process was initiated. As a result, the competent organs recommended that the post should be classified at the P-4 level. The Secretary-General accepted the recommendation. The Applicant now contests his decision.

The Tribunal recalls its constant jurisprudence that the classification of posts is a matter for the discretion of the Secretary-General. The Tribunal does not consider itself competent to intervene, but will consider whether the classification process has been vitiated by prejudice, procedural irregularities or other extraneous factors.

III. The Applicant has challenged the outcome of the classification exercise on different grounds. In her submission to the Classification Appeals and Review Committee (CARC), dated 7 March 1994, the Applicant challenges the classification at the P-4

level, alleging that it is "inaccurate because the entire approach is mechanistic. It totally ignores the particular way the Evaluation Unit functions". In support of her allegation, she quotes the then Director of the Evaluation and Management Services Division, who, in a 1989 memorandum states that "all members of the CEU [Central Evaluation Unit] participate in all the functions of the Unit. The differences in grade levels are related directly to the degree of initiative expected and inversely to the amount of supervision and guidance required." Later on, in her submission to the Tribunal, she claims that there would appear to be no standards for posts in the CEU and that "the only consistent rationale in the Appellant's case is to have the ratings fall short of the need for reclassification to P-5." This, according to the Applicant, was achieved through the reduction of the relevant ratings.

The Applicant also claims that "there is a post in the same unit classified at the P-5 level which carries the same functions as [the Applicant's] and for which no document justifying the classification at that level is available."

IV. It is the Tribunal's task to determine whether these allegations constitute sufficient evidence that the classification process was tainted by prejudice, lack of due process or other extraneous factors.

In this respect, the Tribunal finds that there is no evidence of lack of due process. The report by the CARC dated 5 July 1994, in which the post was finally graded at the P-4 level, is sufficiently explicit and shows no evidence of arbitrariness.

As for the allegation by the Applicant that there is a post identical to hers, which has been classified at the P-5 level, the Tribunal recalls that classification of posts is carried out by reviewing each given post against the master standard for classification of professional posts adopted by the International Civil Service Commission and not by comparing one post to another.

As for the argument that the classification review did not sufficiently take into consideration the particular aspects of the CEU, the Tribunal reiterates that it is only competent to determine the existence of prejudice, arbitrariness, or other extraneous factors. Such possibilities having been excluded, the Tribunal shall not address this point.

V. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Frank SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/781
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 781

Cases No. 855: SHAW
No. 856: WALKER
No. 858: BALDWIN
No. 863: KIMBALL
No. 867: GORDON
No. 872: BERNSTEIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Luis de Posadas Montero, First Vice-President; Mr Hubert Thierry, Second Vice-President;

Whereas at the request of Christine Shaw and Douglas Walker, staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal to 31 March and 31 May 1995;

Whereas, on 13 April 1995, the Applicants Shaw and Walker filed applications containing pleas which alleged that they were:

> "being denied the right to the education grant at United Nations Headquarters on behalf of [their children] solely on the basis of [their] United States nationality and that this constitutes discrimination resulting in unequal pay for equal work ..."

and requested the Tribunal:

> "to reverse the decisions ... denying [their] applications for the education grant for [their] children."

Whereas, on 3 May 1995, C. Stephen Baldwin, a staff member of the United Nations, filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas at the request of Mary E. Kimball, a staff member of the United Nations, the President of the Tribunal extended the time-limit for the filing of an application with the Tribunal to 30 June 1995;

Whereas, on 9 May 1995, the Applicant Kimball filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas at the request of Joan Gordon, a staff member of the United Nations, the President of the Tribunal successively extended the time-limit for the filing of an application with the Tribunal to 31 March and 30 June 1995;

Whereas, on 23 June 1995, the Applicant Gordon filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas, on 28 June 1995, Vivian Bernstein, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 22 August 1995, the Applicant Bernstein, after making the necessary corrections, again filed an application containing pleas identical to those of the Applicants Shaw and Walker;

Whereas the Respondent filed his answer on 2 August 1995;

Whereas, on 28 September and 9 October 1995 respectively, Netta R. Avedon and Phyllis Lee, staff members of the United Nations, requested to intervene in the cases of Shaw, Walker, Baldwin, Kimball, Gordon and Bernstein (hereinafter Shaw et al.);

Whereas, on 25 July 1996, Anne Cunningham and Carolyn Schuler Uluç, staff members of the United Nations, requested to intervene in the case of Shaw et al.;

Whereas, on 30 July 1996, the Tribunal, in accordance with rule 21 of the Rules of the Tribunal and paragraph X.2 of General Assembly resolution 49/223, informed the International Civil Service Commission (ICSC) that six applications were pending before the Tribunal that "may affect a rule, decision or scale of emoluments for contributions of the common system of staff administration" and transmitted a set of the written proceedings to the ICSC at its request;

Whereas, on 10 September 1996, Lilia Amores-Mantas, a staff member of the United Nations, requested to intervene in the case of Shaw et al.;

Whereas all the Applicants filed written observations on 30 September 1996;

Whereas, on 27 September 1996, the ICSC filed a submission to present certain additional considerations with respect to the issues of the case Shaw et al.; and, on 29 October 1996, the ICSC submitted to the Tribunal comments on the Applicants' written observations;

Whereas, on 30 October 1996, the Respondent filed with the Tribunal comments on the Applicants' written observations;

Whereas, on 30 October 1996, the Applicants filed with the Tribunal comments on the ICSC's submission of 27 September 1996;

Whereas, on 30 October 1996, the Tribunal requested the Applicants to provide the Tribunal with all the letters in which the Applicants had requested the Secretary-General to pay them the education grant and all the responses of the Secretary-General thereto;

Whereas the facts in the cases are as follows:

The Applicant Shaw, a United States citizen, entered the service of the Organization on 14 July 1969 and currently serves as Senior Economic Affairs Officer at the P-5 level, on a permanent contract. She applied for the education grant for her daughter Fiona on 1 April 1993. On 6 December 1993 and again on 18 July

1994, she was informed by the Personnel Officer, Staff Administration and Monitoring Service, Office of Human Resources Management (OHRM), that the provisions of staff rule 103.20(b) "do not apply in your case. The Office of Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Walker, a United States citizen, entered the service of the Organization on 1 October 1970 and currently serves as Senior Economic Affairs Officer at the P-5 level, on a permanent contract. He applied for the education grant for his daughter Joy, on 1 August 1993. On 6 December 1993, he was informed by the Personnel Officer, Staff Administration and Monitoring Service, OHRM, that the provisions of staff rule 103.20(b) "do not apply in your case. The Office for Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Baldwin, a United States citizen, entered the service of the Organization on 28 January 1978 and currently serves as a Technical Support Specialist at the P-5 level, on a permanent contract. He applied for the education grant for his children Timothy, Alexandra and Matthew on 20 January 1995. By a memorandum dated 27 February 1995, he was informed by the Personnel Officer, Staff Administration and Monitoring Service, OHRM, that the provisions of staff rule 103.20(b) "do not apply in your case. The Office of Human Resources Management is, therefore, unable to process your request for the education grant."

The Applicant Kimball, a United States citizen, entered the service of the Organization on 17 January 1977 and currently serves as a Senior Political Affairs Officer, at the P-5 level, on a permanent contract. She applied for the education grant for her children Arthur and David on 24 June, 12 September and 7 November

1994. By a message written on her 7 November memorandum, the Applicant Kimball was informed that "staff working at Headquarters, NY, with USA nationality are not entitled to receive the education grant." On 23 May 1995, she again applied for the education grant. By a memorandum dated 16 June 1995, she was informed that "your claims cannot be processed in view of the fact that your duty station, New York, is in your country of nationality, USA."

The Applicant Gordon, a United States citizen, entered the service of the Organization on 12 January 1976 and currently serves as Chief, Administrative Review Unit, at the P-5 level, on a permanent contract. She applied for the education grant for her children Meredith and Matthew on 29 July 1994. She received a return copy of her memorandum to the Personnel Officer, OHRM, on which was written "your request must be denied given that you are an American national". This was signed by the Personnel Officer and dated 4 August 1994.

The Applicant Bernstein, a United States citizen, entered the service of the Organization on 23 November 1981 and currently serves as a Recruitment and Placement Officer, at the P-3 level, on a permanent contract. She applied for the education grant for her children Peter and Michelle on 14 December 1994. By a memorandum dated 8 February 1995, from a Personnel Officer, Staff Administration and Monitoring Service, OHRM, she was informed that "since the above provisions [staff rule 103.20(b)] do not apply in your case, the Office of Human Resources Management is unable to process your request for an education grant advance."

By letters dated 26 September, 27 September and 21 December 1994 and 6 April and 8 May 1995 respectively, the Assistant Secretary-General for OHRM informed the Applicants that the

Secretary-General had agreed to their appealing directly to the Tribunal against the decisions denying them the education grant.

On 13 April, 3 and 9 May, 23 June and 22 August 1995 respectively, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contention is:

Denying the Applicants the education grant is discriminatory since the denial rests solely on the basis of their United States citizenship. This discrimination results in the Applicants being given unequal pay for equal work, which violates the United Nations Charter.

Whereas the Respondent's principal contentions are:

1. The General Assembly, acting under Article 101, paragraph 1, of the Charter, has promulgated regulations which constitute the fundamental conditions of service of staff. The Secretary-General is obliged to implement the education grant scheme consistently with the direction in staff regulation 3.2 that the grant is payable only to staff who serve in a country other than the country of their nationality.

2. Staff regulation 3.2 does not violate the principle of equal pay for equal work as the allowance payable thereunder is based on the objective criterion of expatriate status. Nor does staff regulation 3.2 violate the principle of equality of treatment contained in Article 8 of the Charter.

3. In addition, staff regulation 3.2(a), by requiring expatriate service for payment of the education grant, does not conflict with the principle contained in Article 101, paragraph 3, of the Charter that the paramount consideration in the determination of conditions of service shall be the necessity to secure staff of the highest standards of competence and efficiency.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Applicants are citizens of the United States of America (U.S.), working at United Nations Headquarters in New York. They contest the decisions of the Secretary-General taken under staff rule 103.2(b), denying them the payment of the education grant on the basis of their status as United States citizens working in their home country.

The Secretary-General's decision, as conveyed to the Applicants Shaw and Walker on 6 December 1993, was in the following terms:

> "Staff rule 103.2(b) states that 'a staff member who is regarded as an international recruit under rule 104.7 and whose duty station is outside his or her home country shall be entitled to an education grant in respect of each child in full-time attendance at a school, university or similar educational institution. If such a staff member is reassigned to a duty station within his or her home country, he or she may receive the education grant for the balance of the school year, not exceeding one full school year after his or her return from expatriate service ...'"

In letters to the Applicants, the Assistant Secretary-General for Human Resources Management granted them the right to appeal this decision directly to the Tribunal, as the cases raised only issues of law. All the Applicants raise the same questions and submit similar pleas. Accordingly, the Tribunal orders a joinder of all the cases.

II. The Applicants do not allege any violation of their contracts of employment. Instead, they assert, repeatedly and in a variety of ways (including discussions of such matters as U.S. laws on taxation, naturalization and the U.S. system of education, employment of women, etc.) that the implementation of the education

grant, as originally conceived and planned, has lost its raison d'être, which was essentially to assist the "child's reassimilation in the staff member's recognized home country". It has thereby become totally unjust in its application to the internationally recruited non-expatriate staff members at the Headquarters in New York. From this, they conclude that this grant has in fact become, in New York in any event, a part of the salary of the expatriate staff and that, inasmuch as this "salary supplement" is denied to comparable U.S. nationals at the Headquarters in New York, it is unfair and discriminatory. The Applicants suggest that such a development has made the education grant both outmoded and outdated in such a manner as to place U.S. staff at a disadvantage vis-à-vis their non-U.S. colleagues. They argue that the grant, as at present applied, violates Articles 8 and 101 of the Charter of the United Nations and offends against the principle of equal pay for equal work. In view of these considerations, the Applicants ask the Tribunal to "review" the present implementation of this grant at the Headquarters in New York and declare that it has produced such unfairness and inconsistencies that it should therefore not be administered as at present. The Applicants make no reference to staff of other nationalities who work at duty stations outside of Headquarters and who are also not entitled to the education grant because they are not expatriates. The Applicants also omit to allude to the conditions of work in such other duty stations of the U.N. or its specialized agencies.

III. The Respondent, on the other hand, contends that the General Assembly, as well as the International Civil Service Commission (ICSC), has repeatedly and frequently examined the conditions of entitlement to the education grant and has firmly and consistently maintained that the grant is to be allowed to all expatriate international staff members - irrespective of their place of work. There is nothing in the voluminous discussion of this subject to

show that the application of the education grant can be governed by any selective circumstance prevailing at any given place. The General Assembly, as the supreme legislative body in this matter, has always maintained that this grant is universally applicable and that it is both reasonable and justifiable because of the different conditions of work for expatriates and nationals in the various duty stations. The Respondent, therefore, suggests that this grant and its application or implementation cannot be questioned by any authority in a manner which goes against the repeated wishes of the General Assembly as reflected in its numerous resolutions (vide paragraph IV.7 of resolution 33/119 of 19 December 1978; paragraphs III.4-5 of resolution 37/126 of 17 December 1982; paragraph I.G.2 of resolution 44/198 of 21 December 1989; and paragraph 1 of A/RES/49/241 of 6 April 1995).

IV. The Tribunal was thus obliged to consider the question of its competence in this field. The Tribunal noted that it has, on more than one occasion, attempted to clarify or interpret the intention or implied objective of the resolutions of the General Assembly on various administrative matters (c.f. Judgements No. 273, Mortished (1981); No. 370, Molinier (1985); No. 408, Rigoulet (1987); and No. 656, Kremer and Gourdon (1994)). In doing so, the Tribunal has often been guided by the expression of views, on any subject under discussion, by the competent UN bodies. In this instance, such a body is obviously the ICSC which, pursuant to article 1 of its statute, was established "for the regulation and co-ordination of the conditions of service of the United Nations common system." Under article 10 of its statute, the ICSC makes recommendations to the General Assembly on allowances and benefits of staff which are determined by the General Assembly; a note to article 10 mentions the education grant. The ICSC has frequently been asked by the General Assembly to study the application of the education grant and make suitable recommendations.

V. The Tribunal finds that on all occasions, the ICSC has maintained, irrespective of changes which have taken place over the years and which have also been the subject of study by the Commission, that this grant is essentially and exclusively an expatriate grant which does not form a part of the salary of the recipient, but is related to the educational needs of the children of expatriate international staff members. The Tribunal also notes that, on many occasions in the past, the General Assembly has, with or without the specific recommendation of the ICSC, revised or modified the implementation of this grant. In the circumstances, the Tribunal finds that the legislative provisions for this grant are clear and that there is no scope for the Tribunal to question or interpret them. Staff regulation 3.2(a) unequivocally excludes from the education grant benefit staff members who reside in the country of which they are nationals. The Applicants, all U.S. nationals, clearly fall under the provisions of staff regulation 3.2(a) (c.f. Judgement No. 703, Larsen (1995)).

The intention of the General Assembly has been made clear in such a manner as not to be in doubt; the Assembly has systematically and authoritatively pronounced the grant as related to the fact of expatriation. Indeed, as recently as 6 April 1995, in its resolution 49/241, the General Assembly reiterated its decision that "the repatriation grant and other expatriate benefits are limited to staff who both work and reside in a country other than their home country." It explicitly included the education grant in its discussion of expatriate benefits. In the view of the Tribunal, it has no competence to question such a decision of the General Assembly. The Tribunal is bound to abide by the clear and unequivocal decision of the General Assembly incorporated into the staff regulations and Rules (c.f. Judgements No. 337, Cordovez (1984); and No. 749, Demers Dear (1996)).

VI. In view of the above, the Tribunal does not find it necessary to make further comments on the Applicants' pleas and rejects the applications.

VII. Since the applications to intervene, made under article 19.1 of the Tribunal's Rules by Netta R. Avedon, Phyllis Lee, Anne Cunningham, Carolyn Schuler Uluç and Lilia Amores-Mantas, do not disclose that their intervention would rely on evidence or arguments different from those of the Applicants, the Tribunal rejects their applications on the merits.

(Signatures)

Samar SEN
President

Luis de POSADAS MONTERO
First Vice-President

Hubert THIERRY
Second Vice-President

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
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AT/DEC/782
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 782

Case No. 857: ZOUBREV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of Vladimir Zoubrev, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 15 January, 15 April, 31 July 1993 and, following a remand of the case to the Joint Review Group, to 3 and 30 April 1995, the time-limit for the filing of an application with the Tribunal;

Whereas, on 28 April 1995, the Applicant filed an application requesting the Tribunal:

"(a) To rescind the decision of the Secretary-General dated September 28, 1994 maintaining his previous decision of November 21, 1991, itself confirming his previous decision of March 28, 1991;

(b) To order the Applicant's immediate reinstatement and the payment of full salary and applicable allowances and benefits from the date of his separation from service (April 30, 1991) to the date of reinstatement;

...

(g) To award the Applicant additional compensation to be determined by the Tribunal for the unwarranted suffering and professional and moral damages caused to the

Applicant by the Respondent's actions and failure to enforce the Applicant's terms of appointment;

(h) To fix, under Article 9, paragraph 1 of its Statute and Rules, the amount of compensation to be paid in lieu of specific performance at forty months of net base pay in view of the special circumstances of the Applicant's case."

Whereas the Respondent filed his answer on 22 January 1996;

Whereas the Applicant filed written observations on 20 February 1996;

Whereas the facts in this case are as follows:

The Applicant entered the service of the Organization on 17 September 1986, after having attended the UN Language Training course in Moscow, on a one-year fixed-term appointment as a Translator, at the P-3, step I level, in the Russian Translation Service, Translation Division of the then Department of Conference Services (DCS) at UN Headquarters in New York. His Letter of Appointment stated that he was "on secondment from the USSR Government". With effect from 17 September 1987, the Applicant's fixed-term appointment was extended for three years. His performance evaluation report (PER) for the period 17 September 1986 to 30 June 1987 gave the Applicant an overall rating of "a good performance".

In August 1990, the Officer-in-Charge, DCS, sent to the Office of Human Resources Management (OHRM) a list of ten members of the Russian Translation Service, including the Applicant, whose contracts were due to expire in September-November 1990 and for whom no extensions were recommended; the contracts of two other members of the Service were to be extended for two weeks only. On 11 September 1990, the Under-Secretary-General, DCS, wrote to the Assistant Secretary-General, OHRM, recommending that the appointments of eight of the Russian translators mentioned in the

earlier memorandum, including the Applicant, be extended through the end of the General Assembly session.

On 2 November 1990, the Applicant wrote to the Director, Translation Division, DCS, requesting a one-year extension of his contract. By a letter dated 28 March 1991, from the Director, Staff Administration and Training Division (SATD), OHRM, the Applicant was informed that his request had been denied and that he would be separated from the Organization on 30 April 1991.

On 25 May 1990, the Administrative Tribunal rendered its Judgement No. 482, Qiu, Zhou and Yao (1990). In the light thereof, on 20 December 1990, the Administration constituted a Joint DCS/OHRM Group (hereinafter referred to as the JRG) to review both those language staff members whose contracts were about to expire and who were previously considered to be on secondment, as well as those appealing a decision not to renew their appointments. The JRG set out criteria for examining each current and former staff member for a further appointment.

The Applicant's PER for the period 1 July 1987 to 31 December 1990, indicated that he received six "C"s, six "B"s and two "A"s and the overall rating of a "good performance". The PER was signed by the Chief of the Russian Translation Service, as the First Reporting Officer, on 16 January 1991; the signatures of the Second and Third Reporting Officers appear to be those of the Director/DCS. The PER rated the quantity of work produced (Item 3) as "B" (very good). The Applicant signed the PER on 4 February 1991.

On 28 March 1991, the Director, SATD, OHRM, informed the Applicant that she had accepted the recommendation of the JRG with regard to the Applicant's case and that the Applicant would be separated from the Organization on 30 April 1991. She attached the relevant part of the JRG report, which noted that the most recent PER had been read out at the JRG meeting and that the "Chief of Service stated that in all aspects his [the Applicant's] productivity was low when compared to other staff for the years 1989

to 1990". The JRG report concluded, "Final recommendation was made not to extend Mr. Zoubrev's fixed-term appointment". The Applicant submitted a rebuttal to his PER on 13 May 1991 and, on 30 April 1991, he separated from service.

The Rebuttal Panel's report, dated 23 July 1991, recommended that one item of the Applicant's contested PER be upgraded from "C" to "B", one item be deemed "not applicable", and the Applicant's overall rating be upgraded to "a very good performance". The Rebuttal Panel stated that the "administrative irregularities in the preparation of this performance evaluation report can do nothing but raise questions regarding the accuracy of the ratings it contains". In order for the overall rating to reflect the individual ratings, the Panel re-assessed the individual ratings and concluded that "no matter what decision is taken concerning the recommendation of the Panel regarding items 1 and 11, the overall rating should be '2' (a very good performance), not '3' (a good performance)".

However, in her appraisal of the Rebuttal Panel report dated 7 August 1991, the Officer-in-Charge of DCS, who was also the Second Reporting Officer, decided not to change any of the Applicant's ratings.

On 10 September 1991, the Applicant requested the Secretary-General to review the foregoing administrative decision. On 2 October 1991, the Director, SATD, OHRM, informed the Applicant that the JRG would again consider his case.

On 5 November 1991, the Applicant lodged an appeal with the JAB against the decision relating to his PER.

On 20 November 1991, the Director, SATD, OHRM, informed the Applicant that, in the light of the recommendation of the JRG, the Secretary-General had decided to maintain his decision not to extend the Applicant's appointment. On 16 December 1991, the Applicant lodged an appeal with the JAB against this decision.

The JAB adopted its report on 8 June 1992. Its consideration and recommendation read as follows:

"...

17. The Rebuttal Panel's first conclusion touched on 'administrative irregularities in the preparation' of the PER [performance evaluation report]. ... On internal evidence, the Panel was convinced that the Rebuttal Panel had done its work thoroughly and conscientiously, and had no reason to question the validity of its recommendations, specifically that

- The rating for 'Competence' be raised to 'B';

- The rating for 'Ability to negotiate and persuade' be 'not applicable', and

- The overall rating be raised to 'a very good performance'.

...

... The Panel recalls in this connection [i.e., the evaluation of the Applicant's performance] UNAT Judgement No. 363 (De Franchis), which reads:

> '... In that context, any steps of the Administration that could lead to an assessment of a staff member's performance that would be reasonably open to challenge may constitute a breach of the staff member's right to have his performance assessed in an absolutely impartial way.'

In the absence of an explanation of the appraisal by [the Officer-in-Charge, DCS] - or by the Respondent, for that matter - the Panel considered that the assessment of Appellant's performance is 'reasonably open to challenge'.

19. The Panel then turned its attention to the review proceedings established 'with respect to staff members originally thought to be on secondment.' ... The peculiar situation of the Chinese and Russian staff both prior to and after UNAT Judgement No. 482 and the admitted need of the Administration to establish special transitional measures demonstrated the fallacy of that statement. It was, therefore, incumbent upon the administration to devise measures that, if not precisely like those applied to other staff members, would - at a minimum - guarantee the same procedural safeguards. This, the Administration failed to do.

> ... It [the Panel] could not accept that the legal obligation of the Organization to an individual to whom it may have made an offer of appointment is on a par with the obligation of the Organization under the terms of staff regulation 4.4 to a serving staff member. ...
>
> ... The factors to be taken into account by the Joint Review Group ... were '(i) favourable record of performance; (ii) need for continued services ...; (iii) availability of post.' There was no question as to the second and third factors; however, the Panel could not find a definition in the Criteria or by the Joint Review Group of a 'favourable record'.
>
> 22. ... The Panel had established to its own satisfaction that Appellant's rating should have been a 'very good performance', but the Joint Review Group was given [the Officer-in-Charge, DCS]'s appraisal and a rating for Appellant of 'a good performance'. The Panel concluded that the Joint Review Group had been misinformed on a significant point. ...
>
> 23. ... The Panel has no doubt that the decision to terminate Appellant's fixed-term appointment was tainted by falsehood and a serious lack of due process.
>
> Recommendation
>
> 24. The Panel recommends, therefore, that Appellant be paid compensation in an amount equivalent to six months' net base salary."

In a letter dated 21 October 1992, the Assistant Secretary-General, OHRM, advised the Applicant as follows:

> "In view of the procedural deficiencies identified by the Board in your case, and in view of the comments made by the Administrative Tribunal in Judgement No. 559 on the procedures followed by the Joint Review Group in two other cases, the Secretary-General has decided to remand your case to a reconstituted Joint Review Group which will consider your situation anew."

In a letter dated 28 June 1993, the Officer-in-Charge, SATD, OHRM, invited the Applicant to submit his comments to the reconstituted JRG, which the Applicant did on 15 July 1993.

On 25 February 1994, the reconstituted JRG submitted its report. It concluded that there were "insufficient grounds" to reverse the decision of the original JRG not to renew the Applicant's appointment. In a letter dated 28 September 1994, the Director, SATD, OHRM, advised the Applicant as follows:

> "... I regret to inform you that, in light of the recommendation of the Joint Review Group, the Director of Personnel has decided to maintain the earlier decision regarding your case."

On 28 April 1995, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's fixed-term appointment was vitiated by prejudice and extraneous considerations. The delay and the inconsiderate silence of the Respondent in connection with the handling of the Applicant's case amounted to a serious breach of the Applicant's contractual rights.

2. The procedure of the JRG denied the Applicant due process and its recommendation was tainted by falsehood.

3. The Applicant was deprived of his right to due process in connection with his PER that covered the period from 1 July 1987 to 31 December 1990.

Whereas the Respondent's principal contention is:

The reconstituted JRG gave the Applicant every reasonable consideration for a career appointment and accorded him due process in so doing.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals the decisions of the Secretary-General not to extend the Applicant's fixed-term appointment. He seeks reinstatement and additional compensation for moral and professional damage. In lieu of specific performance, he seeks 40 months' net base salary. The Joint Appeals Board (JAB) found that the Respondent's decision not to extend the Applicant's contract was tainted by falsehood and that the Applicant had been denied due process. It recommended that the Applicant be paid six months' net base salary as compensation. The Secretary-General remanded the Applicant's case to a reconstituted Joint Review Group (JRG). The reconstituted JRG upheld the finding of the original JRG, not to renew the Applicant's appointment. The Secretary-General accepted this finding and the Applicant appeals this decision to the Tribunal.

II. The Applicant questions the procedure adopted by the JRG which, he says, did not provide for proper consideration of his case. He also claims that he was deprived of his right to due process in connection with his performance evaluation report (PER) covering the period 1 July 1987 to 31 December 1990. Pending the review resulting from the Tribunal Judgement No. 482, Qiu, Zhou and Yao (1990), the Applicant's appointment was extended to 31 March 1991.

III. The Applicant's PER for the period 1 July 1987 to 31 December 1990, giving an overall rating of a "good performance", was signed by the Chief, Russian Translation Section, on 16 January 1991. The PER was also apparently signed, on 21 January 1991, by the Officer-in-Charge, Department of Conference Services (DCS). The rating for item 3, Quantity of work accomplished was "B" (very good). The Applicant was informed that, on the recommendation of the JRG, the Respondent had decided not to offer him a further appointment and that he was to be separated from service on 30 April 1991. An

extract from the JRG's report accompanied this notification. It disclosed that the most recent PER had been read out and that the Chief of Service had stated that, in all aspects, the Applicant's productivity had been low when compared with that of other staff members for the years 1989 to 1990.

IV. Subsequent to his separation on 30 April, the Applicant, on 13 May 1991, submitted a rebuttal to the PER. The Rebuttal Panel recommended, in its report of 23 July 1991, that one item be upgraded from "C" to "B", that one item be deemed "not applicable" and that the overall rating be upgraded to "a very good performance". In making this recommendation, the Panel stated that it believed that, in order to allay suspicion that extraneous considerations were a factor in the preparation of any PER, the overall rating must reflect the individual ratings. The Officer-in-Charge, DCS, on 7 August 1991, said that, having considered the recommendations of the Panel, she decided that all ratings should remain unchanged.

V. In response to the Applicant's request for an administrative review of this decision, the Director, Staff Administration and Training Division (SATD), Office of Human Resources Management (OHRM), informed the Applicant that the JRG would again consider his case. On 6 November 1991, the Applicant filed his appeal against the decision relating to his PER. On 20 November 1991, the Director, SATD, OHRM, informed the Applicant that, in the light of the JRG's recommendation, the Secretary-General had decided to maintain his decision not to extend the Applicant's appointment. The letter enclosed a portion of the JRG's report, which concluded: "Final recommendation: Given the totality of the circumstances, including relative performances, particularly the ratings of individual items and the needs of the service, it was not possible

to make a recommendation in favour of [the Applicant]". The staff representative placed on record reservations regarding the final recommendation.

VI. The Respondent's decision not to offer the Applicant a further appointment and that he be separated from service as of 30 April 1991 followed a recommendation of the JAB. This recommendation was based on considerations in which the PER clearly played a significant part. Yet, this was a PER which the Applicant had not rebutted at the time of the JRG's review. In the Tribunal's view, the JRG should not have had to base its consideration on an unchallenged presentation of the Applicant's performance but should have had the outcome of the Applicant's rebuttal before it.

The importance of this point is highlighted by the findings of the Rebuttal Panel, which upgraded the Applicant's overall rating to "a very good performance", leaving open the possibility, at least, that the JRG's recommendation would have been different if it had been in possession of the amended PER.

VII. The Applicant also takes issue with the decision of the Officer-in-Charge, DCS, that all ratings should remain unchanged. The Respondent argues that no specific format for appraisal is required in examining the Applicant's ratings, nor must reasons be given. As appraising performance after rebuttal is an administrative process and not a judicial proceeding, the Respondent contends that there was no reason for the Officer-in-Charge to have disqualified herself. The Respondent also contends that the usual format used by the Department was followed in carrying out the appraisal.

In the Tribunal's view, it is clearly undesirable that the Officer-in-Charge, who had initially participated in the assessment of the Applicant's performance in the original PER, should subsequently adjudicate on the conclusions of the Rebuttal Panel.

Indeed, there is a clear conflict of interest in the Officer-in-Charge, DCS, being involved in both aspects of this process, and she should not have carried out the appraisal. Because of the far-reaching consequences of her decision, the Officer-in-Charge was involved in something far more important than an administrative process. It is unacceptable that, in a matter of such consequence, and, particularly in view of her involvement in the initial part of the process, the Officer-in-Charge should have issued her finding on the Rebuttal Panel's conclusions without giving any explanation for such finding.

VIII. The reconstituted JRG took into account the totality of the circumstances, which included relative performance. The JRG took into account the claims of competing candidates and reviewed the staffing situation. There were two vacant P-3 posts in existence at the time of the Applicant's separation. One post was used for the re-assignment of another P-3 level staff member, who had been held against a P-4 level recruit who had accepted an offer of employment made previously. The other post was filled by another staff member who had been reinstated as a result of an earlier review on the basis of what the JRG describes as his excellent performance. However, the JRG's assessment of the Applicant's performance was based on flawed procedures and so its recommendation must, of necessity, be questioned.

While the question of the Applicant's performance permeated the report of the JRG and played an important part in its considerations, it is not possible to determine that the JRG's findings would have been different if the performance of the Applicant had been fully and accurately presented to it.

It is, however, beyond argument that, because the procedure was flawed from the outset right through to the final recommendation of the JRG, the Applicant was deprived of due process. The Applicant is, therefore, entitled to compensation.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant 15 months' net base salary at the rate in effect as of the date of his separation.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary